

MTC Public Participation Working Group on Sales and Use Tax Nexus Guideline  
**Minutes of Task Force I Teleconference**  
**Tuesday, July 8, 1997, 1:00pm-2:30pm (Eastern)**

Identified Teleconference Participants:

Bill Brady- Task Force Co-Leader	Trish Johnson
Bill Lunka- Task Force Co-Leader	David Levine
H. Beau Baez	Terry McDonald
René Y. Blocker (Reporter)	Wood Miller
Merle Buff	Martha Mote
Terry Charles	Larry O’Nan
Sean Cronin	Robert Schemenauer
Robert Feinschreiber	George Sorensen
Alan Friedman	Mike Southcombe
Jeff Friedman	June Summers Haas
Kendall Houghton	Dale Vettel

Paul Mines commenced the teleconference with an acknowledgement of a quorum and discharged some preliminary requirements to the meeting. The co-leaders, Bill Lunka and Bill Brady, presided over the remainder of the teleconference.

The participants agreed that this teleconference would focus primarily on discussion of the issues. The aim of the next teleconference would be to identify areas on which a consensus may be reached and to identify areas of disagreement.

**Issue 1: Whether the “purposeful availment” due process standard for *in personam* jurisdiction properly applies to sales and use tax jurisdiction?**

The discussion of whether there was any dispute among the participants that *in personam* jurisdiction principles applied to sales and use tax jurisdiction moved instantly into the question of the parameters of “purposeful availment.”

To illustrate the possible outer reaches of the principle, a hypothetical was posed regarding an employee of a business involved in a car accident in a State in which the employer otherwise has no physical presence and to which the employer directs no business solicitations. The question was posed whether as a consequence of the occurrence of the accident in the State (and presumably the use of services in the State like police, the courts, *etc.*) the State could impose a use tax collection obligation on the employer for goods sold to in-state customers and delivered by mail or common carrier. The response was that this example did not illustrate the application of *in personam* jurisdiction principles to sales and use tax nexus. The

principle in the guideline is that the connection with the State must be the same connection for which the tax applies.

To confirm the intended limitations of the principle as set forth in the guideline, the group discussed a scenario involving an out-of-state locomotive manufacturer that directs its solicitations to only one customer in a State on an occasional basis and from whom that one customer purchases a locomotive every five years. The locomotive manufacturer neither solicits nor sells to any other person in the State. The State would consider the locomotive manufacturer's activities to constitute "purposeful availment" of the State's market. The activities of the locomotive manufacturer may or may not fit into the "regular and systematic solicitation" standard that is the basis for the alternative rule in II.A.3.c.

A conclusion was suggested that the purposeful availment due process standard in the guideline (II.A.3.b.) accurately reflects the application by the Court in *Quill* of the *in personam* jurisdiction standard set forth by the Court in *Burger King*. However, no consensus was reached on this conclusion.

A suggestion was made to re-phrase the introductory language of II.A.3. ("[u]nder minimum contacts nexus, a use tax collection duty may be imposed ...") to clarify that only the due process prong of the nexus analysis is met if one of the three alternatives listed has been established. Staff agreed to "tweak" the language accordingly.

Several issues regarding practicalities were raised during this discussion: the guideline does not indicate what could be done once due process nexus has been established, like requiring submission of customer lists; no evidentiary standards for establishing "purposeful availment" or "regular and systematic solicitation," (such as evidence of planning, budgeting and expenditure by taxpayer) are set forth in the guideline. Some suggested that these matters probably should be reflected in the phase II document that will state possible alternatives for easing sales and use tax collection, not in the phase I document that reflects constitutional standards.

One member reminded the participants that the Working Group anticipated the development of two documents: one to address issues of agreement and disagreement on the constitutional limits of State sales and use tax jurisdiction (phase I) and one to reflect alternatives for States that did not desire to extend their jurisdictional reach to the limits of the Constitution.

## **Issue 2: How does the "regular and systematic solicitation" standard relate to the "purposeful availment" standard?**

There was agreement among several participants on the suggestion that "regular and systematic solicitation" (II.A.3.c.) is a subcategory of "purposeful availment" (II.A.3.b.). It was noted the proviso contained in II.A.3.b. requires that the tax collected pertain to the business occurring in the State and this proviso is not contained in II.A.3.c. The purposeful availment standard cannot abandon the

proviso. However, applying the proviso to II.A.3.c. would limit the use tax collection obligation, when II.A.3.c. is designed to allow collection for all activities. As an example, an out-of-state vendor sells both widgets and balloons but solicits sales for only balloons in a State. The vendor has no physical presence in the State. Under the purposeful availment standard, the vendor would have due process nexus for use tax collection with respect to its sales of all balloons in the State but may not have due process nexus for use tax collection with respect to its sales of any widgets in the State. Under the regular and systematic solicitation standard of II.A.3.c., due process nexus would exist for the widgets regardless of whether the purposeful availment standard of II.A.3.b. was met.

The general proposition suggested under the guideline is that regular and systematic solicitation establishes due process nexus for all sales in a State and purposeful availment establishes nexus for only the particular targeted market. In response, it was noted that the purposeful availment proviso could be read to establish due process nexus for collection of all taxes and that there should be a fairness hurdle for both of the standards.

The participants agreed to forego attempting to reach a conclusion on this issue during this teleconference.

### **Issue 3: How is the concept of “*de minimis*” properly to be applied, including the burden of proof issue?**

Several specific issues were identified for discussion by the task force:

- Whether *de minimis* is an appropriate standard at all in the sales and use tax nexus area? (Is the concept considered to be particular to P.L. 86-272, *Wrigley*?)
- Does *de minimis* mean activity that does not constitute substantial nexus?
- How is *de minimis* related to “slightest presence”? To “trivial” presence?
- Is a *de minimis* physical presence standard appropriate for due process analysis?

*Appropriate for due process?* A number of participants reflected that the *de minimis* concept may have no place in the due process nexus analysis because the due process standard is already a minimal standard; several called it a standard upon a standard. Others indicated that *de minimis* is not a due process concept because due process is governed by fundamental fairness. The elimination of Section II.A.3.a. entirely was proposed. Although there was acknowledgement that a case may be made for removing the section because physical presence is not necessary to establish due process nexus, there was no consensus to eliminate the section entirely. An alternative suggestion was made that a more appropriate approach would be a fairness analysis, thus, the *de minimis* proviso in II.A.3.a. should be changed to a fairness proviso.

**Consensus:** The term *de minimis* will be removed from the due process portion of the guideline. Section II.A.3.a. would be changed to replace *de minimis* with the “fairness and substantial justice” notion contained in Sections II.A.3.b. and II.A.3.c.

An argument also was made that there may not be a need even for a purposeful availment standard under the reasoning that the Court’s decision in *International Shoe* can be read to support the proposition that if *in personam* jurisdiction exists, then tax jurisdiction exists.

*Appropriate for sales and use tax nexus?* Is *de minimis* the equivalent of showing that there is not substantial nexus? Can the concepts of *de minimis*, trivial contact and slightest presence be equated? One articulated view of the concept during the discussion described the *de minimis* concept as one of general application in legal analysis that reflects notions of equity; the concept is an integral part of the common law process.

Several views regarding the relationship of *de minimis* to substantial nexus were discussed. One suggested a big gap between *de minimis* and substantial nexus, with the latter being the higher standard. This view questioned the need for *de minimis* in the guideline since *de minimis* was not the standard set forth by the Court. An alternative suggested that there is no gap—activity that constitutes more than *de minimis* is activity that establishes substantial nexus. Additionally, *de minimis* becomes important once presence in a State has been established because the issue may be whether that presence is trivial or whether it reflects a conscious submission to the State’s jurisdiction. It was clarified that in the guideline, the *de minimis* concept largely would apply to instances involving a relationship to property in a State; *de minimis* is not as frequently applied in the context of a relationship to people (e.g., employees) in a State. The difference between the two views may reflect the difference in drawing the nexus bright line.

A suggestion was made that perhaps *de minimis* could be quantified. However, it was noted that research bore out the almost universal reluctance on the part of courts to establish a bright line for application of the *de minimis* concept. The phase II nexus document may be the appropriate place to set forth some objective *de minimis* qualifiers.

*De minimis burden of proof.* It was pointed out that as a matter of equity, the *de minimis* burden of proof is on the party bring the action (generally, the taxpayer in these cases). The aim is to place the burden on the party that possesses the information. It was also noted in contrast that this burden required proof of a negative, a seemingly impossible task. A suggestion was made that issues regarding the level of proof required could be addressed in the phase II nexus document.

Participants agreed to give some thought to these issues and try to identify areas in which a consensus could be reached during the next task force session. The next Task Force I teleconference is scheduled for Tuesday, July 15, 1997 at 1:00pm (Eastern).